

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

74-2542

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2542, 75-7003

CHRIS-CRAFT INDUSTRIES, INC.

Plaintiff-Appellant-Cross Appellee,

—against—

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER,
WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M.
SALGO, DAVID W. WALLACE AND THE FIRST BOSTON CORPORATION,
Defendants-Appellees-Cross-Appellants.

*Appeal from a Final Judgment of the United States District
Court for the Southern District of New York*

PETITION OF DEFENDANTS-APPELLEES-CROSS AP- PELLANTS BANGOR PUNTA CORPORATION, NICO- LAS M. SALGO AND DAVID W. WALLACE FOR RE- HEARING OR, ALTERNATIVELY, SUGGESTION FOR REHEARING EN BANC

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April 25, 1975

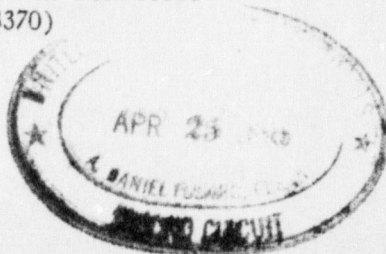


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TON CORPORATION,

*Defendants-Appellees-
Cross-Appellants.*

PETITION FOR REHEARING

To the Honorable Judges of the United States
Court of Appeals for the Second Circuit

Statement

Bangor Punta Corporation ("BPC"), Nicolas M. Salgo and David W. Wallace, defendants-appellees-cross-appellants, respectfully petition for reargument of this appeal pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure. Because of the significance of the decision on the parties and the business community, BPC suggests that the rehearing be held *en banc*.

The decision for which a rehearing is sought was filed on April 11, 1975* and reversed that portion of the opinion of the Court below** relating to the question of the proper

* *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, Civil No. 74-2542 (2d Cir. 1975) ("Chris-Craft III")

** *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 384 F.Supp. 507 (S.D.N.Y. 1974)

measure of damages in this action. This Court held that the trial court and the parties misunderstood the mandate on damages contained in its previous decision and an incorrect legal standard was applied.* The Court stated that it had intended that the measure of damages set forth in *Chasins v. Smith, Barney & Co.*, 480 F.2d 1167 (2d Cir. 1970) and *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969), was to be applied on remand, although these cases were not cited by the Court in its previous opinion. Then, selectively using evidence offered at the trial by the parties on the incorrect legal standard for different purposes, the Court unilaterally increased the judgment awarded to Chris-Craft Industries, Inc. ("CCI") from \$1,673,988 plus pre-judgment interest of \$599,010.89 to \$25,793,363 plus pre-judgment interest of approximately \$10,000,000.

Significance of the Decision

The effect of this Court's decision upon BPC and those members of the public who have a vital interest in the continued viability of BPC is grievous. Although BPC was held jointly and severally liable to CCI with the other defendants, under the law this award of damages could initially be assessed entirely against BPC. If such an eventuality occurred, the effect upon the ability of BPC to continue the normal conduct of its business would be extremely critical. Already, BPC's lending banks have suspended its lines of credit. Even timely contribution from The First Boston Corporation ("First Boston") and to the limited extent of their resources, from the Piper brothers, would only slightly ameliorate the adverse financial impact of this judgment. Consideration in either event would have to be given to resorting to the protection of the bankruptcy laws. The adverse effects such a step would have upon the welfare of BPC's 7,000 employees, 25,000 public investors, creditors and suppliers are obvious, and far outweigh the

* *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), cert. denied, 414 U.S. 910 (1973) ("Chris-Craft II")

Court's expressed concern over a possible expenditure of a few days of judicial manpower necessary for, at least, a remand for a new trial.

Further, the issue of the standard of damages applicable to indemnify CCI for the actual damages suffered by it has never been briefed or argued by the defendants because of their misunderstanding of the Court's decision in *Chris-Craft II*. The expansion by the Court of the rule of damages set forth in *Chasins* to all cases involving securities laws violations should be considered by the Court *en banc* only after hearing all the ramifications of such a rule of law.

The application of the *Chasins* rule in this case leads to a complete contradiction of the fundamental determination of liability. This Court held that it intended to indemnify CCI for the loss of a fair opportunity to compete for control of Piper Aircraft Corporation ("Piper"). (Slip Op. p. 2867, n. 29) The instant decision now places CCI in the position of recovering almost its total investment in Piper because it was found to have been denied the opportunity to compete for control of Piper, which control it could not prove it would have obtained. (Slip Op. p. 2838) Furthermore, CCI still has the opportunity to gain control of Piper because under this Court's previous mandate in *Chris Craft II*, BPC is required to make a rescission offer in the near future to the holders of over 110,000 Piper shares (480 F.2d at 391-2), and the right to accept the rescission offer is assignable. CCI, by acquiring and exercising less than one-half of these rights, could reduce BPC below 50% ownership and obtain control of Piper in the market.

Even more basic is the effective denial of elemental due process occasioned by the trial on the appellate level of the issue of damages. Because of the misconception—shared by the trial court and all the parties to this case—concerning what this Court intended in its previous opinion, BPC and the other defendants are being denied the opportunity to offer a considered defense both at the trial and appellate

levels to the enormous damages assessed against them by this Court on appeal. The sole justification for not remanding this case for a trial on the entirely new issues raised by the decision is that this action is six years old, and it would be a "waste of judicial manpower" to allow BPC an opportunity to defend itself. (Slip Op. p. 2852) The previous trial lasted three and one-half days, and a trial on the narrower issues of fact raised by the application of the *Chasins* case would take even less time. This small expenditure of judicial time is far outweighed by the interests of the employees, investors and business community in the continued viability of BPC, particularly when the confusion was caused by this Court's previous decision.

Reasons for Granting Rehearing

A. Defendants have been denied an opportunity to present an effective defense to the enormous judgment awarded by this Court.

(i) *The Trial.*

There can be no disagreement that the Court below did not apply the measure of damages that this Court has ruled was applicable. Furthermore, the trial court's error as to what this Court intended when it stated that:

"The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. . . ." (480 F.2d at 379)

was shared by and affected the vital interests of all the parties to this case. None of the parties contemplated that this Court intended that the *Chasins* rule applied in this case. The new issues of fact raised by *Chasins* were never litigated, although such facts are clearly subject to proof. All the parties, at the direction of the trial court, proceeded on the theory that the reduction in appraisal value of CCI's Piper shares on September 5, 1969 was the issue, not what such shares cost or could have been sold for on a subsequent date. If the contrary were true, CCI would not have offered the testimony of five experts (EV 820-21, EV 877-78, EV

905-9, 3065-68A, 3385-88A*) and the defendants' three experts (EV 1235-47, EV 1120-23, 3224-32A, 337A, EV 1209-1232) addressed to various economic analyses and methods for ascertaining the reduction in the appraisal value of CCI's Piper shares on September 5, 1969.

(ii) *The Appeal.*

The defendants did not submit a brief on appeal addressed either to the issue of law as to the applicability of the *Chasins* rule or whether there is, as the Court unilaterally held, evidence in the record to establish the price at which CCI could have sold its shares to the public (Slip Op. p. 2851). If this Court had clearly stated in *Chris Craft II* that it intended that the *Chasins* rule be applied, not only would the defendants have proceeded differently at the trial, but they would have briefed the legal reasons why *Chasins* does not apply and why it is necessary to remand for a new trial. Instead, the defendants were misled by the failure of the Court to state clearly what it intended was the correct measure of damages. The judicial time consumed at the trial and on appeal was not caused by the defendants.

B. There is no probative evidence in the record supporting the judgment for \$36 million.

The Court decided not to remand this case for a new trial because it assumed that the new trial record would consist primarily of the experts' written reports already in evidence and would produce "essentially the same record now before us." (Slip Op. p. 2852) BPC vigorously disputes this assumption upon which this huge money judgment is based.

The defendants offered no evidence at the trial for the purpose of proving the earliest date upon which CCI would have sold its Piper shares or the sales price. This was not because such facts were incapable of proof, but because under the trial court's definition of the issues, such evidence was not relevant. (384 F.Supp. at 512-514) The case of

* References followed by the letter "A" are to the joint appendix on appeal; references preceded by "EV" are to the exhibit volumes.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946), is not applicable here because the relevant facts can be proven with competent evidence. Defendants can prove that a public sale of CCI's Piper shares could have taken place within days of August 18 or September 5, 1969. The trial record on remand would be materially different.

This Court found as a fact that a sale could not have taken place until January 31, 1970 solely upon two paragraphs in Wahrsager's written report which contained numerous unsupportable assumptions of fact and law.* Not only were these assumptions never evaluated by the trial court because they were irrelevant to the issues as defined, their inherent deficiencies have never been pointed out by the defendants to this Court.

The two paragraphs read as follows:

"It would, of course, not have been possible to offer the shares publicly until after the filing of a registration statement with the SEC and the review of such registration statement by the SEC. Also it is normal underwriting practice not to offer shares based on 9-months unaudited financial statements, but to defer such offerings until year-end audited financials are available.

"The preparation of a registration statement would have required a minimum of two weeks and probably would have required a somewhat longer period of time. It is unlikely that the review of the registration statement would have been completed by the SEC before late November; given the extensive backlog at the SEC in late 1969, it might have been necessary to delay such offering until January 1970, or until after such later date at which audited financial statements were available." (EV 835)

These factual and legal assumptions are hardly probative, much less so convincing that no other reasonable conclusion

* Three of CCI's experts testified that a public sale of CCI's Piper shares was not a feasible alternative. (2582A, 2644-46A, 3030-32A)

could be reached by a trier of fact than that a sale could not take place until five months later.

For example, the BPC registration statement for its exchange offer to Piper shareholders dated July 18, 1969 was still effective on August 27, 1969, nine days after CCI gave up its fight for control. (EV 12-123) Such registration statement included essentially all the material, including financial statements, required in a Piper registration and had been subjected to recent scrutiny by the Securities and Exchange Commission. A Piper registration statement could have been available in days, if required. Further, Wahrsager's legal conclusion that adequate financials were not available flies right into the face of the SEC regulation specifically governing what financial statements are required in registration statements.* Piper had valid, current financial statements available which could have been used to support a public offering at any time through December 31, 1969. Wahrsager's unsupported statement that it is not "normal" for underwriters to use nine-month figures can be proven false.

There are numerous other deficiencies in Wahrsager's assumptions of fact which could be demonstrated in a brief on reargument. On a remand, the parties could offer competent proof upon which a court could conclude that a public sale of CCI's Piper shares could have taken place at any time between August 18, 1969 and December 31, 1969 at market prices far in excess of \$27 per share.

- C. The application of the *Chasins* measure of damages to this action is a radical departure from prior law and one which contravenes the statutory limitation of damages to actual damages on account of the act complained of.**

The Court held in *Chris-Craft II* and has reaffirmed that:

"Defendants' unlawful acts caused a 'denial to CCI of a fair opportunity to compete for control of Piper.'"
(Slip Op. p. 2854).

* SEC Form S-1, prescribed pursuant to Rule 401, Regulation C. See Item 21, Financial Statements and the Instructions thereunder.

Pursuant to this clear definition of injury, the Court below valued the lost "opportunity to compete for control," and it is submitted that the judgment entered compensated CCI fully for the defined injury.

The defect in the measure of damages formulated by this Court in *Chris-Craft III* is that it is totally unrelated to any denial of control. The Court held that the proper measure of damages was not the value of the opportunity for control, but the "difference between the price CCI paid for its stock and the price it could have obtained for it through a public offering after BPC unlawfully acquired control." (Slip Op. p. 2859) The complete divorce between the formula and what CCI was denied is dramatically demonstrated by the fact that, in utilizing its formula to calculate the \$36 million damages awarded CCI, the Court assumed that the control premium, hence control, had a value of zero. (Slip Op. pp. 2853-54)

The inappropriateness of the formula adopted by the Court becomes clear when it is recognized that had CCI been successful in obtaining control, it would have suffered *precisely the same decline in value* of its Piper stock, which the Court's formula awards it as damages.

In summarily reversing the Court below, the Court cited *Chasins v. Smith Barney & Co.*, *supra*, and *Esplin v. Hirschi*, *supra*, as authorities. Even a cursory examination of those cases, however, shows a critical difference between them and the instant case. In both *Chasins* and *Esplin*, plaintiffs had been induced by defendant's fraudulent misstatements to purchase stock, and the Court reasoned that but for defendant's fraudulent inducement, plaintiff would not have purchased and thus would not have suffered a loss when the stock declined. The damage formula followed from the rationale of the decision. Here, however, where defendants' tort was preventing rather than inducing purchases, the rationale is totally inapplicable. Unlike *Chasins* and *Esplin*, there is no basis for contending that but for defendants'

tort, plaintiff would not have suffered the loss. If the *Chasins* rule applies to this case, it applies to all securities cases.

It is submitted that the Court's application of the *Chasins* formula to the instant case is contrary to the statutory command of Congress. Section 28(a) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78bb(a), specifically limits a plaintiff to recovery of "his actual damages on account of the act complained of." The injury here was the denial of the opportunity to obtain control, and the subsequent decline in the value of Piper shares because of a generally declining market cannot be construed as damages suffered on account of the acts complained of. The Court's decision has ramifications far beyond the instant case and promulgates the *Chasins* formula as the new general measure of damages for all securities cases. Before such a far reaching change in previously accepted doctrine is made, it is submitted that this Court should hear and determine the issue *en banc*.

D. Nature of BPC's liability.

In order to place in proper perspective the huge amount of damages awarded here on the appellate level, the nature of BPC's liability to CCI should be kept in mind. In *Chris-Craft I*, this Court, Judges Lumbard and Moore dissenting, reversed the District Court and held that BPC violated Rule 10b-6 in that it purchased 120,200 Piper shares for cash in May, 1969, after it had announced its intention to make an exchange offer to Piper shareholders. (426 F.2d 569, 576-77) In *Chris-Craft II*, BPC was held liable for a violation of Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e), because the financial statements incorporated in the prospectus used in its exchange offer to the Piper shareholders in July, 1969 were found to have carried an asset, BPC's investment in the Bangor & Aroostook Railroad, at an obsolete valuation. (480 F.2d at 377-79) Although it was alleged that BPC fraudulently concealed the value of this asset, this Court held that no fraud was involved but that

BPC's failure to revalue the asset was something more than "mere negligence." (480 F.2d at 369, 397)

Therefore, the predicate for the award of the massive damages in this case against BPC and its catastrophic effects upon a large segment of the public was not fraud but violations of highly technical trading and financial reporting rules, concerning which reasonable men could differ.

Conclusion

Petitioners respectfully request that this Court order a reargument of the appeal in this case and further suggest that such reargument be heard by the Court *en banc*, and that upon such reargument the opinion of the Court be vacated and the judgment of the District Court be affirmed or, in the alternative, the case be remanded with instructions for a trial of the issue of damages under the *Chasins* rule.

Dated: New York, New York
April 25, 1975

Respectfully submitted,
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